(13)

No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE SAC AND FOX NATION, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, WICHITA CADDO AND DELAWARE INDUSTRIES, MUSCOGEE (CREEK) NATION, YANKTON SIOUX TRIBE, CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA AND THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

G. William Rice, Esq.*
Gregory H. Bigler, Esq.
N. Brent Parmer, Esq.

G. William Rice, P.C.
124 N. Cleveland
Cushing, Oklahoma 74023
(918) 225-4800

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

351

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE SAC AND FOX NATION, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, WICHITA CADDO AND DELAWARE INDUSTRIES, MUSCOGEE (CREEK) NATION, YANKTON SIOUX TRIBE, CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA AND THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37, the Sac and Fox Nation, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita Caddo and Delaware Industries, Muscogee (Creek) Nation, Yankton Sioux Tribe, Cheyenne and Arapaho Tribes of Oklahoma and the Absentee Shawnee Tribe of Oklahoma (hereinafter referred to as "The

Tribes"), file this brief *amicus curiae* on the side of respondent and in opposition to the petitioner in this case. Both respondent and the petitioner have consented to the filing of this brief of *amicus curiae*.

The Tribes are federally recognized Indian tribes with longstanding treaty relationships with the United States and are established, well organized tribal governments. Petitioner challenges the decision below by contending that Oklahoma, and thus the Tribes, have no Indian reservations. Such a ruling is argued to mean that the Tribes and their members are subject to virtually total state authority and control on all Indian-owned lands restricted against alienation by federal law. A holding by this Court in favor of petitioner on these grounds would have a devastating impact on the Tribes and their members, for it would deprive the Tribes of virtually all their traditionally exercised governmental authority.

The Tribes' governmental interests are vital. The Tribes submit the attached brief to show that the jurisdictional status of Indian owned restricted lands resides with the Tribal and Federal government. The Tribes also wish to address the history of decisions by this Court and the lower federal and state courts precluding state jurisdiction, and upholding federal and tribal jurisdiction, over Indian lands in Oklahoma, including allotments, reserved lands and subsequently acquired lands. Both Congressional policy, and the consistency of federal and state court decisions upholding federal jurisdiction and denying state authority serve as reason for this Court to affirm the decision of the Court of Appeals for the Tenth Circuit.

INTEREST OF AMICUS CURIAE

The Tribes are important federally-recognized Indian tribes with a continuous treaty relationship with the United States, which began in the earliest years of the Republic, having well-organized tribal governments. The governmental authority of the Tribes would be seriously compromised if the Court were to rule favorably on the contentions presented by petitioner. Petitioner argues that the absence of a reservation equates to full state governmental authority over the Indian Country of the Tribe. The Tribes have a vital interest in protecting their governmental authority, and their corresponding exemption from state jurisdiction. This authority and exemption are established in prior decisions of this Court.

Some of the Tribes participating in this brief administer their own tribal court supported by Bureau of Indian Affairs grants and contracts, tribal tax revenues, and tribal funds. Other Tribes participating in this brief participate in the Court of Indian Offenses administered by the Anadarko Area Office or the Muscogee Area Office of the Bureau of Indian Affairs, 25 C.F.R. § 11.1 (1987). Most of the Tribes are organized with a written constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967 (25 U.S.C. § 503) (hereinafter O.I.W.A.) Some of the Tribes have also incorporated the provisions of the Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. § 461 et seq.) (Indian Reorganization Act) with Secretarial approval.

Pursuant to these fundamental foundations, these Indian tribes have enacted, and enforce, a myriad of statutes which regulate the conduct of all persons within

the Indian Country subject to the jurisdiction of their particular tribe. Some of the laws enacted by one or more of the tribes include provisions authorizing the incorporation of business and non-profit corporations, removal or discipline of elected tribal officials, the regulation of the gaming industry, regulation of the mineral mining industry including oil and gas mining, regulating security agreements and the filing and enforcement of liens, provisions for the levy and collection of tribal taxes including taxes on all forms of tobacco, regulation of certain industries, provisions providing for public health facilities and public housing, provisions defining the punishment for criminal offenses and providing for police and fire protection, as well as provisions for complete trial and appellate court systems with what is believed to be model tribal laws relating to tribal courts, civil, criminal, appellate, and juvenile procedure, and rules of evidence. Interpreters are provided in the tribal courts when needed.

In addition to these statutory enactments, the courts of these tribes enforce tribal traditions and customs as the common law of the affected tribe in a manner similar to that in which American customs and traditions are enforced as the common law in state and federal courts. Actions relating to marriage, divorce, child custody, guardianships, probate of estates, contract rights, tortious conduct, and requests for relief in equity are not uncommon.

These laws are enforced within the Indian Country of each tribe. This consists, at a minimum, of the trust or restricted allotments and lands owned by the tribe reserved from allotment or acquired in trust by the

United States or restricted against alienation by the United States pursuant to Acts of Congress, 25 U.S.C. §§ 177, 335, 465, 501. Each tribe maintains the position that their original reservation boundaries were not disestablished, or that at worst, their reservation was diminished but not disestablished in the allotment process. This question has not yet been authoritatively determined under the modern definition of Indian Country, or the modern test for reservation disestablishment or diminishment as adopted by this Court in response to the enactment of 18 U.S.C. § 1151.

The Tribes have a direct interest in the outcome of this action insofar as the Oklahoma Tax Commission requests this Court to render a sweeping decision judicially abolishing federally recognized tribal governments and Indian Country without Congressional sanction.

SUMMARY OF ARGUMENT

1. Indian Tribes have always been recognized as being immune from suit absent their consent or the consent of Congress. This immunity is black letter Hornbook law which Congress has taken pains to retain in several statutory enactments. Without an express waiver of the Tribe's sovereign immunity, the Oklahoma Tax Commission cannot prevail.

2. Indian Country is the appropriate, Congressionally approved, term of art to describe the territorial area of tribal self-government. The Potawatomi tribal store is located on a tract of land within the original Potawatomi reservation in what is now Oklahoma. This tract of trust

property is Indian Country, and is subject only to Federal and Tribal jurisdiction.

3. The Oklahoma Tax Commission's attempt to tax the Potawatomi Tribe directly interferes with Tribal self-government and economic development. Oklahoma's attempt to levy and collect taxes from the Tribe reduces Tribal governmental revenues and destroys the ability of the Tribe to create a positive legal infrastructure for economic development with the Indian Country subject to its territorial jurisdiction.

4. Congress has never lifted the Constitutional and statutory pre-emption of state authority concerning the Indian Country of the Potawatomi and other Tribes in Oklahoma. The original framers of the Constitution clearly intended Congress to have exclusive control over trade with the Indians regardless of whether the non-Indian party was buying or selling. While Congress has made provision for certain states to exercise jurisdiction in some cases over non-Indians engaged in such transactions, Oklahoma has not obtained such authorization. In the absence of compliance with the federal prescription for obtaining such authority, Oklahoma cannot divest the Congress of its exclusive authority.

ARGUMENT

I. THE CITIZEN BAND POTAWATOMI HAS COMPLETE SOVEREIGN IMMUNITY FROM OKLAHOMA CLAIMS.

The Oklahoma Tax Commission's arguments attempt to deny the tribes their traditional sovereign immunity. This Court has stated that Congress has plenary power over the tribes but the Court also recognizes that it is Congress which creates shifts in Federal policy towards Indians, not the courts. The courts may not invade the legislative function.

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed. 2d 667 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co.*, supra, 309 U.S. at 512, 60 S.Ct. at 656.
>
> It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976), quoting, *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969).

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

Until such time as Congress determines that it is time to reduce or extinguish the sovereign immunity of the tribes the courts must continue the tribes' protection from unconsented suit, especially from the states. *United States v. Kagama*, 118 U.S. 375 (1886).

II. THE TRACT OF LAND AT ISSUE IS INDIAN COUNTRY SUBJECT TO EXCLUSIVE FEDERAL AND TRIBAL JURISDICTION ABSENT AN ACT OF CONGRESS TO THE CONTRARY

The term "Indian Country" is perhaps first defined by statute in the Act of June 30, 1834, 4 Stat. 729 (1834) as "all that part of the United States . . . to which Indian title has not been extinguished", and included within its terms the area which now comprises the State of Oklahoma. The effect of the early statutes defining Indian Country was summarized by the noted Indian law scholar, Felix Cohen, in his *Handbook of Federal Indian Law* 6 (1942 Ed.) as follows:

> Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all[1].

---

[1] The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. 18 U.S.C. § 1161 (liquor laws); Act of February 15, 1929, Ch. 216, 45 Stat. 1185 (health and

(Continued on following page)

Although the 1834 definition of Indian Country was not included in the Revised Statutes of the United States, and therefore repealed, it provided a useful mechanism for the Court to apply statutory laws relating to "Indian Country" and "Indian Reservations". *Donnelly v. United States*, 228 U.S. 243, 269 (1913). In a series of now famous cases, the Court developed a definition of "Indian Country" at common law which included Indian reservations; *Bates v. Clark*, 95 U.S. 204 (1887); *Donnelly v. United States*, 228 U.S. 243 (1913), trust and restricted Indian allotments; *United States v. Pelican*, 232 U.S. 442 (1941); *United States v. Ramsey*, 271 U.S. 467 (1926), and areas set aside for the use and occupancy of Indians (dependent Indian communities) although not called a "reservation". *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. McGowan*, 302 U.S 535 (1938).

In *Bates v. Clark*, 95 U.S. 204, 209 (1887), the Court stated:

> It follows from this that all the country described by the act of 1834 as Indian Country remains Indian Country so long as the Indians retain their original title to the soil, and ceases to be Indian Country whenever they lose that

---

(Continued from previous page)

education) (25 U.S.C. § 231); 25 U.S.C. §§ 232, 233 (New York); 18 U.S.C. § 1162 (criminal jurisdiction in Public Law 83-280 states); 28 U.S.C. § 1360 (civil jurisdiction in Public Law 83-280 states); 25 U.S.C. §§ 1321 et seq. (assumption and retrocession of civil or criminal jurisdiction by states which are not mandatory Public Law 83-280 states). Oklahoma was not granted, and has never assumed, jurisdiction over Indian Country within its borders pursuant to Public Law 33-280.

> title, in the absence of any different provision by treaty or by act of Congress.

Although the Indian Country status had been tied to aboriginal ownership of the soil, this Court in *Donnelly* extended the application of the term to lands reserved for tribes carved from the public domain. Tribal ownership, however, remained the benchmark indicia of Indian Country status for Indian reservations as a historical consequence of the 1834 act. In pre-1948 decisions of this and other courts, as well as those cases which rely without critical analysis upon such decisions, the ownership of title to the soil was often critical to the status of land as Indian Country or "reservation" land.

The foregoing decisions left open the question of whether land within the exterior boundaries of an Indian reservation which was held in fee (in other words an "open" or assimilated" reservation) was Indian Country. Cohen, *Handbook of Federal Indian Law* 8 (1942 Ed.). The practical effect of this "open reservation" issue was whether federal and tribal jurisdiction remained exclusive in reservation areas where allotments had been taken and the surplus sold, or where trust periods had expired, or where restrictions against alienation had been removed.

In 1948, Congress resolved this issue in favor of federal and tribal jurisdiction over trust or fee patented lands within reservations, and codified the Supreme Court's existing common law classification of Indian Country by the Act of June 25, 1948, 62 Stat. 757, codified in its present form at 18 U.S.C. § 1151, which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Oklahoma was not excepted from the terms of this Act. The impact of this Congressional action was to render obsolete Court decisions which tied Indian Country status of Indian lands to issues of land title, and to define by statute the territorial area for the operation of tribal government. The question of continuing land ownership remains relevant only in the context of Indian allotments outside Indian reservations. This Court, while often speaking in terms of "reservation" or "allotment" or "dependant Indian community" as relevant in a particular circumstance has, since 1948, clearly held that "Indian Country" is the legally recognized term of art defining the territorial area for the exercise of tribal self-government. *United States v. Mazurie*, 419 U.S. 544, (1975)[2];

---

[2] "Cases such as *Worcester*, supra, and *Kagama*, supra, surely established the proposition that Indian tribes within 'Indian Country' are a good deal more than 'private, voluntary organizations.' " *Mazurie* at U.S. 557.

DeCoteau v. District Court, 420 U.S. 425 (1975)[3]; *United States v. John*, 437 U.S. 634 (1978)[4]; *Solem v. Bartlett*, 465 U.S. 463 (1984).[5]

It is obvious that the term "Indian Country" encompasses reservation areas, and the areas enumerated in section 1151 are to be treated equally as those areas are all "Indian Country". The reservation is indeed "Indian

---

[3] In footnote 2 of the opinion, the court stated: "If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." While § 1151 is concerned on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the Court concluded: "In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151(c)." *Id.* at U.S. 446.

[4] At page 649 of the opinion, the Court stated: "With certain exceptions not pertinent here, § 1151 includes within the term "Indian Country" three categories of land. The first, with which we are here concerned, is [Indian reservations]." In the accompanying footnote 17, the Court stated in part: "Inasmuch as we find in the first category a sufficient basis for the exercise of federal jurisdiction in the case, we need not consider the second and third categories [of Indian Country]."

[5] In footnote 8 at page 467 of the opinion the Court stated: "Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of congress fall within the exclusive criminal jurisdiction of federal and tribal courts." (citations omitted).

Country", and the laws applicable to the reservation are logically applicable to the areas set out in 1151(b) and (c). *See, DeCoteau v. District Court*, 429 U.S. 425 (1975), *United States v. John*, 437 U.S. 634 (1978), *United States v. Pelican*, 232 U.S. 442 (1914), *United States v. Sandoval*, 231 U.S. 28 (1913).

Every modern Court which has considered the question has determined that "Indian Country" exists in Oklahoma including: (1) restricted allotments, *State v. Burnett*, 671 P.2d 1165 (Okla. Crim. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985), *cert. denied*, 476 U.S. 1106 (1986); (2) trust allotments, *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. 1978) (agreeing with unpublished federal district court decision to the same effect, *see*, 573 P.2d at 264), and (3) tribal trust lands, *compare, State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (Quapaw tribal lands) with *Indian Country USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) cert. den. sub. nom., *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S.Ct. 2870 (1988) (tribal lands of Creek Nation) *See also; Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *Ahboah v. Housing Authority of Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983), *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990).[6]

---

[6] Additionally, there exists in Oklahoma trust and restricted Indian allotments and other Indian lands that constitute "dependent Indian communities" under Section 1151(b). See *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Azure*, 801

(Continued on following page)

According to Petitioner, the trust land of the Potawatomi at issue herein is not a reservation and therefore not protected from state intrusion. The Tax Commission demonstrates in almost every respect a total misunderstanding of Federal Indian law and the nature of Indian Country. The Petitioner attempts to show that the tract of land does not fit the definition of reservation as that word was used in the 1891 statute.[7] The Tax Commission even goes to the absurd point of criticizing the lower court because it found the land to be Indian Country by only "quoting the text" of this Court's test in *United States v. John*, 437 U.S. 634 (1978) that the land be set apart for the use of Indians as such. There is simply no magic in the use of the term "reservation", since lands set aside for use of Indians because of their status as Indians are Indian Country whether referred to as reservation or by some other term. *United States v. McGowan*, 302 U.S. 535 (1938).

Indian Country, USA, supra, addressed many of the same issues raised yet again by the Tax Commission. In denying state authority to regulate tribal bingo on tribal

---

(Continued from previous page)

F.2d 336, 339 (8th Cir. 1986); *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971). Oklahoma cases have applied this standard as well to preclude state jurisdiction on Indian lands in Oklahoma. *C.M.G. v. State*, 594 P.2d 798 (Okla.), cert. denied, 442 U.S. 992 (1979) (Chilocco Indian School is a dependent Indian Community and thus "Indian country;" there is accordingly no state juvenile court jurisdiction).

[7] Act of March 3, 1891, ch. 543, § 8, 26 Stat. 1016.

trust lands belonging to the Creek Nation, the Tenth Circuit carefully reviewed the turn of the century legislation and policy that, as with the Potawatomi, conveyed away much of the Creek Nation's land, and which additionally seriously affected the Creeks' government. The court concluded that:

> Although the federal legislation described above seriously undermined the authority of the Creek Nation, we are not persuaded that Congress intended or acted to completely abolish Creek Nation jurisdiction over tribal lands, to divest the federal government of its authority, or to permit the assertion of jurisdiction by the State of Oklahoma.
>
> . . . The language of the Oklahoma [enabling] act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians and dissolving completely the tribally-owned land base events that never occurred and goals that Congress later expressly repudiated. The State has failed to cite any acts of Congress that clearly reveal an intent to divest the federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma.

829 F.2d at 978, 979-980. (footnote omitted)

The Tax Commission also ignores the different language used in the two acts conveying the land back to the Potawatomi, Act of Sept. 13, 1960, 74 Stat. 903 and Act of August 11, 1964, 78 Stat. 382, and the third placing it in trust, Act of Jan. 2, 1975, 88 Stat. 1922. The first two

unequivocally state that "title of the tribe" to the lands conveyed "shall be subject to no exemption from taxation or restriction on use, management or disposition because of Indian ownership." Act of Sept. 13, 1960, 74 Stat. 903, and Act of August 11, 1964, 78 Stat. 392. The third relevant act avoids such language and instead states that the land shall be conveyed "to the United States in trust for the Citizen Band of Pottawatomie." The first two acts had to use very specific language to preclude the land from falling within the definition of Indian Country and thus the special laws that would otherwise apply to tribally owned land.[8] It is beyond reason for the Tax Commission to argue that lands taken into trust for a tribe in Oklahoma are not "Indian country" under 18 U.S.C. § 1151(a).

III. THE STATE IS WITHOUT AUTHORITY TO TAX BECAUSE OF INTERFERENCE WITH TRIBAL SELF-GOVERNMENT.

The federal government maintains a federal policy encouraging Indian economic development and tribal self-government. If the tribal businesses must pay both state and tribal taxes on top of federal taxes, then contrary to the Oklahoma Tax Commission's statements, there is not a level playing field. Instead, economic development in Indian Country would be devastated by having to pay triple taxation, or the Tribal government will have to forego sorely needed tax revenues and its ability

[8] *See* 25 U.S.C. § 177 flatly prohibiting purchase, grant, lease or other conveyance of lands or any claim or title thereto by any tribe unless such alienation was pursuant to treaty or convention pursuant to the Constitution.

to exercise its governmental functions by creating a legal infrastructure within which to conduct trade and other business. *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 388, 96 S.Ct. 2102, 2111 (1976) noted the destructive effect of allowing the tribe to be subject to state and local tax.

State taxes would limit the tribes ability to raise and maximize tribal revenues, to determine whether to make certain property or transactions tax exempt, or to limit taxation of certain property or businesses in order to encourage economic development, all of which would directly infringe on their ability to govern their own affairs.[9] Such taxes frustrate federal efforts to aid Indian Country. Congress annually appropriates approximately one billion dollars a year for Federal Indian programs. Almost half of this appropriation, $500 million, is then immediately pulled back out of Indian Country through federal and state taxes. *id* note 9, p. 188.

The Oklahoma Tax Commission's attempt in this case to assess the Potawatomi taxes in the amount of $2.3 million is substantively and procedurally defective. The State of Oklahoma has neither civil nor criminal jurisdiction within Indian Country. *Housing Authority of the Seminole Nation v. Harjo,* 790 P.2d 1098 (Okla. 1990), *Ahboah,* supra. It is absolutely inconceivable that Congress would allow any significant state taxation in areas where the tribes are responsible for both civil and criminal jurisdiction. Furthermore, the responsibility of exercising civil

[9] *See State and Indian Tribal Taxation on Indian Reservations – Is It Too Taxing?,* 1989 Harvard Law Symposium, Susan Williams and Kevin Gover. pp. 180-181. (1990, President and Fellows of Harvard College).

jurisdiction carries with it the responsibility of regulating interactions with both Indian and non-Indian.

The Potawatomi, unlike any state government, are asked to exercise criminal and civil jurisdiction while having tax monies drained by both the federal and state taxing authorities. The State of Oklahoma has revenues drained from only one authority (federal), while tribal governments are responsible for both civil and criminal jurisdiction in the Indian Country within the State. Thus state taxation within "Indian Country" located in Oklahoma has not been allowed or authorized by Congress.

A key consideration in determining the authority of a state to tax within "Indian Country" is whether the state has civil and criminal jurisdiction. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 178-179 (1973), the Court, in dealing with such a situation, explained:

> . . . a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians . . . *But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected* . . . Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention . . . the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case. (Emphasis added).

Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in "Indian Country". *Bryan v. Itasca County*, 426 U.S. 373 (1976). But there has never been any case

which has held that a state may tax Indians within any part of "Indian Country" where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power.

Neither *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) nor *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), involved tribes which provided services to the taxpayers. But in Oklahoma the Potawatomi provide the protection of its civil laws to all individuals doing business within its jurisdiction. This protection and exercise of jurisdiction extends to both Indian and non-Indian alike.

Requiring the Tribes to provide both civil and criminal protection within its jurisdiction while draining tax monies to sources outside that jurisdiction is unconscionable. A tribe's interest compared to others in raising revenue for essential government programs is stronger when the taxpayer is the recipient of tribal services. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). This is especially true when as in this case the tribe is the taxpayer. The State of Oklahoma argues for the right to extract tax monies from the Potawatomi jurisdiction while the burden of exercising civil and criminal jurisdiction is on the Tribe. This frustrates tribal self-government and therefore state taxation is not allowed. *Williams v. Lee*, 358 U.S. 217 (1959). Further, the same federal preemption barrier to State taxation which existed in *McClanahan* is present in this case.

The brief of the Tax Commission argues that the Indian Reservations in Oklahoma have been disestablished pursuant to the Dawes Severalty Act. Brief of Pet.

at pp. 13-21. This ignores two fundamental facts. First, what now comprises the State of Oklahoma required two separate allotment acts to deal with all the tribes in Oklahoma. The Dawes act by its own language did not affect the Five Civilized Tribes in Indian Territory and thus could not change the nature of their reservations. On the other hand, the Commissioner's reports referenced in Petitioner's brief did not apply to the Citizen Band Potawatomi or other Tribes located in what was, at that time, the Oklahoma Territory. Second, to quote from this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-479 (1976):

> The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era: 'Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust period expired, the reservation *could* be abolished . . . The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act.' citing *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245 (emphasis added).

In *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988) the appellate court relied upon this Court's holding in *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) for the effects of a general repealer clause in a statute dealing with Indians

> [T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. [S]tatutes are to be construed liberally

> in favor of the Indians, with ambiguous provisions interpreted to their benefit. If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA must be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts.

Muscogee (Creek) Nation v. Hodel, 851 F.2d, at 1445. (citations omitted.)

Thus, even to the extent some Indian Tribes in eastern Oklahoma (the "Indian Territory") lost a portion of their governmental powers at the end of the last century, the O.I.W.A. restores the Indian Tribes in Oklahoma to their original exclusive jurisdiction over those transactions occurring within their country to the exclusion of the state. At a minimum the O.I.W.A. requires the state to show an affirmative subsequent Congressional delegation of authority to the state to enter the Indian Country within Oklahoma. The state has yet to show that it has received such a Congressional grant of power, except for the above discredited reliance on the Allotment Acts. In other words, prior to the creation of the State of Oklahoma, the Tribes exercised undiminished and exclusive authority in civil matters arising in their country for the simple reason that no state existed to challenge that authority. Given the prohibition against assertion of state jurisdiction imposed by the Oklahoma Enabling Act, and the failure of the Oklahoma Tax Commission to show any explicit general Congressional grant of authority to tax or regulate trade with the Indians since statehood in 1907, the State's position must fail.

IV. OKLAHOMA CANNOT TAX THE SALE OF CIGARETTES BY THE POTAWATOMI TRIBE BECAUSE CONGRESS HAS NEVER DISSOLVED THE FEDERAL PRE-EMPTION BARRIER TO STATE JURISDICTION.

The Oklahoma Tax Commission would have the Court believe that this controversy is solely one of State vs. Tribal authority. In truth, it is a question of the authority of the Federal government vis-a-vis the State.

Article I, Section 8, Clause 3 of the Constitution of the United States vests the sole power to control commerce between citizens or subjects of the United States and the Indian Tribes exclusively in the Congress of the United States. The founding fathers explained their reasons for vesting such authority exclusively in Congress instead of a sharing arrangement with the States – as had been the case under the Articles of Confederation – in the following manner:

> [T]he prospect of present loss or advantage, may often tempt the governing party in one or two States to swerve from good faith and justice; but those temptations not reaching the other States, and consequently having little or no influence on the national government, the temptation will be fruitless, and good faith and justice be preserved. . . . Not a single Indian war has yet been occasioned by the aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States . . .

See, The Federalist No. 3, p. 43-44 (C. Rossiter ed. 1961) (NAL Penguin, Inc. Publisher), and further:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom by taking away a part and letting the whole remain.

See, The Federalist No. 42, pp. 268-269 (C. Rossiter, ed. 1961) (NAL Penguin, Inc. Publisher). Far from allowing the situation occasioned by the Articles of Confederation to remain, the Constitutional Convention intentionally framed the Commerce Clause to remove from the States all authority concerning commerce with the Indian Tribes by non-Indians. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In *Kennerly v. District Court*, 400 U.S. 424 (1971), the Court recognized that Public Law 83-280, 28 U.S.C. §1360 as amended by 25 U.S.C. §1322 was a "governing Act of Congress" concerning state authority to regulate matters

involving Indians in the Indian Country thereby precluding reliance on an "infringement test" or application of a balancing test. Simply stated, Congress intended that States comply with this act in order to acquire jurisdiction over commerce with Indians in the Indian Country.

> Examination of the Federal statutes and State Constitutions have revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are . . . Oklahoma. . . . *Effect of the disclaimer of jurisdiction over Indian land within the borders of these States* – in the absence of consent being given for future action to assume jurisdiction – *is to retain exclusive Federal jurisdiction until Indian title to such lands is extinguished*. (emphasis added).

S. Rep. No. 699, 83rd Cong., 1st Sess., 1953 U.S. Code Congressional and Administrative News 2409, 2412 (legislative history).

This statute, commonly referred to as P.L. 83-280, expressly extends the civil and criminal laws having general application to all persons and property within the State into the Indian Country within the states subject thereto, with certain limitations as to the application thereof to Indians of the affected Indian Country. This statue, then, is the sole Congressionally authorized general mechanism for states to exert authority over commerce with Indians in the Indian Country.

It is absolutely clear that with rare exception Congress has not allowed the taxation of Indians in "Indian Country" by a state. *Montana v. Blackfeet*, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136

(1980); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *McClanahan*, supra. Nor may a state generally tax Indians in "Indian Country" even if a state has assumed criminal and civil jurisdiction over "Indian Country". *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976). Apparently, however, if a state has general civil and criminal jurisdiction within "Indian Country" pursuant to P.L. 83-280, that state may tax non-Indians in "Indian Country" if the tax burden does not frustrate tribal self-government or federal policy. *McClanahan*, supra, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In *Moe* and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) the Court allowed a tax on non-Indians. In *Moe*, the tax on non-Indians did not frustrate tribal self-government and was not prohibited by the federal preemption barrier which had been removed by P.L. 83-280, 28 U.S.C. § 1360 as amended and supplemented by 25 U.S.C. § 1322. The Oklahoma Tax Commission is not in a situation similar to *Moe* and *Colville* because the Tax Commission has taxed the tribe directly through an assessment, and because Oklahoma have never obtained jurisdiction over non-Indians involved in commerce with Indians in the Indian Country via P.L. 83-280.

The Tenth Circuit decision correctly dismissed the arguments of the Oklahoma Tax Commission regarding *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). That portion of the 10th Circuit's decision correctly noted the distribution of jurisdiction

between the tribes, the state and the federal government in Oklahoma. The decision in *Colville* is irrelevant in this case because it relies upon *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) which in turn is grounded upon the fact that the ability of the state to tax non-Indians engaged in transactions with Indians came from the grant of authority from Congress found in Public Law 83-280. In *Moe*, the non-Indian was liable for the tax because Congress had not exempted taxation of non-Indians when the general Commerce clause preemption was removed by Public Law 83-280.[10] The non-Indian, because Congress had made state law specifically applicable to him, would be committing a crime by possession of unstamped cigarettes. These cases simply do not apply unless Congress has made state law applicable within the Indian country in question because no crime would be committed.

---

[10] *See, Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), in which the opposite result was reached, i.e. a white person was not taxable by the state regarding transactions with Indians in Indian country, in a state where the federal preemption barriers to state tax law as to non-Indians had not been removed by Public Law 83-280. To attempt to create differences in the nature of goods such as cigarettes and other items that are imported into Indian Country for resale defies logic. The Warren Trading Post clearly imported processed goods into the Indian country simply to resell them. The only logical and consistent legal underpinning of these cases, even if disavowed by this Court, flows directly from the decision of Congress, expressed by statute, to allow state tax laws to apply to non-Indians within particular Indian country areas at issue in *Moe* and *Washington*.

Therefore, the real issue here is whether Congress or the Oklahoma Tax Commission have the authority to regulate commerce between the Citizen Band Potawatomi and subjects or citizens of the United States. Simply stated, the Constitution vests Congress with the exclusive authority to regulate such activities. Although Congress has provided Oklahoma a mechanism to share in that authority in part, Oklahoma has not seen fit to amend its Constitution or enact specific legislation to comply with the conditions required by Congress for the acquisition of such authority.

The previous "cigarette tax cases" of this Court are not to the contrary because in each case the State had acquired jurisdiction as to "all persons and property" in the Indian Country affected through Public Law 83-280 with the exceptions noted by this Court in those cases. It would indeed be oxymoronic to recognize, on the one hand, that Tribal sovereignty is subject only to the authority of Congress, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982), and to allow, on the other hand, intrusion by the State into the Tribe's territorial jurisdiction as established by Congress, and subjugation of the Tribe's rights to self-government to the governing authority of a State without the consent of the Tribe or Congress.

CONCLUSION

If the Court is to remain faithful to the intent of the framers of the Constitution, it must uphold the authority of Congress alone to regulate commercial transactions

involving Indians in the Indian Country and affirm the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

G. WILLIAM RICE, ESQ.*
Attorney General,
Sac and Fox Nation

GREGORY H. BIGLER, ESQ.
N. BRENT PARMER, ESQ.

G. WILLIAM RICE, P.C.
124 N. Cleveland
Cushing, Oklahoma 74023
(918) 225-4800

* Counsel of Record